Nos. 12,349 and 12,352

IN THE

United States Court of Appeals

For the Ninth Circuit

TIMOTHY E. ARMSTRONG, et al., *Appellants,* vs. MATSON NAVIGATION COMPANY (a corporation), and UNITED STATES OF AMERICA, *Appellees.*	No. 12,349
JAMES KEITH CURRIE, as Administrator of the Estate of JACK GEORGE CURRIE, Deceased, *Appellant,* vs. MATSON NAVIGATION COMPANY (a corporation), and UNITED STATES OF AMERICA, *Appellees.*	(CONSOLIDATED CASES) No. 12,352

APPELLANTS' REPLY BRIEF.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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(CONSOLIDATED CASES)

APPELLANTS' REPLY BRIEF.

1. **THE SHIPPING ARTICLES WERE PLAIN, CERTAIN, AND UNAMBIGUOUS, AND CLEARLY ENTITLED THE LIBELANTS TO WAR BONUS, AT THE RATES STIPULATED THEREIN, COVERING THE PERIOD FROM THE CROSSING OF THE 180TH MERIDIAN WESTBOUND UNTIL CROSSING THE SAME MERIDIAN EASTBOUND.**

In the *President Harrison* cases (177 F. 2d 107, 111) this court determined that the shipping article riders there involved entitled the seamen to war bonus at the stipulated rates while they were interned on land west of the 180th meridian. An argument of the appellee therein was that collective bargaining agreements between shipowners and labor unions of which the seamen were members defined "war zones or areas in the terms of voyages" and therefore excluded war bonus for internment on land. (Bf. Appellee, p. 41, *President Harrison* cases.) In holding the argument unsound the court said, 177 F. 2d, at page 109:

> "It is a rational interpretation to regard the men, the vessel and the voyage as *not* the *war zone*. Rather each of the three is *in* the war zone. The men remained employees in the war zone during the internment, expressly a contemplated incident of the employment contract."

The riders here involved, unlike the riders in the *President Harrison* case, contain an express agreement in the very first paragraph thereof whereby the shipowner agrees "to pay war risk bonuses to the crew of the SS MALAMA from the crossing of the 180th Meridian Westbound until recrossing the same Meridian Eastbound". (App. Op. Bf. pp. 6, 7.) And the riders here involved, like the riders in the *President Harrison* cases, provided for payment of war

bonus while employees were in a war zone after destruction of the vessel.

Appellees do not contend that the seamen were not entitled to war bonus after the destruction of the Malama by enemy action on January 1, 1942, for the 37 days they were interned on the Japanese raider west of the 180th meridian en route to Japan. (A 88, 94-95.) Nor do appellees contend that the seamen were not entitled to war bonus after liberation on or about September 5, 1945, and while they were on vessels *or airships* west of the 180th meridian on repatriation. (A 88, 94-95.) On the contrary, appellees admit the payment of war bonus for such periods and are apprehensive that despite such payments appellants are again claiming them. (Bf. Appellee U.S.A., p. 4.) Apprehension is unnecessary. Appellants' assignments of error leave no doubt that their claim of war bonus is for the period they were interned on land west of the 180th meridian. (App. Op. Bf. p. 12.)

On this appeal the appellees again repeat and elaborate the argument that war zones or areas should be defined in the terms of voyages and war bonus for internment on land thereby excluded. The answer by this court to the same argument in the *President Harrison* cases is equally sound in this case. On the authority of those cases (177 F. 2d 107, 111) a reversal of the decree of the District Court denying appellants war bonus for the period they were interned on land west of the 180th meridian must inevitably follow.

2. THE COURT ERRED IN EXCLUDING EVIDENCE OF THE CONSTRUCTION GIVEN THE SHIPPING ARTICLES BY THE PARTIES AT THE TIME OF SIGNING.

In their opening brief (p. 13) the appellants referred to 45 U.S.C.A., sec. 565. That statute enjoined upon the shipping commissioner the duty of acquainting the master and seamen with the conditions of the riders and ascertaining that they understood them. Appellants offered evidence at the trial to the effect that when the shipping articles were signed questions arose to the meaning of the riders and that the shipping commissioner then explained and construed them. The construction he gave to the riders and announced to the master and seamen was in accord with the reasonable construction thereof for which appellants contend and in accord with the construction given by this court to similar riders in the *President Harrison* cases. The court excluded such evidence. The cited statute will not permit it to be doubted that the court erred in thus ruling. Nowhere in the briefs for appellees is the said statute referred to or considered.

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3. THE COURT ERRED IN EXCLUDING EVIDENCE OF CONTEMPORANEOUS ORAL CONTRACT BETWEEN THE PARTIES FOR PAYMENT OF WAR BONUS FOR PERIOD OF INTERNMENT ON LAND.

The present cases were tried before the decision of this court in the *President Harrison* cases. The trial judge was then committed to the view that neither the riders nor the collective bargaining agreements stipulated for payment of war bonus while the seamen were

interned on land. (*Agnew v. American President Lines, Ltd.,* 73 F. Supp. 944.) It was plain that the master and the seamen signed the shipping articles of the Malama on the understanding that the seamen would be paid war bonus for whatever period they might be interned on land west of the 180th meridian. It was equally plain that if the riders did not create a contract of that character then the master and the seamen made a collateral one to that effect with the approval of the shipping commissioner and it became a part of the shipping articles. The proctor for the appellants believed and still believes that in a court of admiralty where seamen are traditional wards the evidence offered should have been admitted. The authorities cited in the opening brief at pages 14 and 15 confirm that belief. *The Kambira,* C.C.Ala., 100 F. 118-119, may be added.

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4. THE COURT ERRED IN EXCLUDING EVIDENCE OF DEVIATION OF VOYAGE.

The Malama arrived at Honolulu after Pearl Harbor and the declaration of war against Japan and then sailed for New Zealand. It is idle for any one to contend that this was not a deviation from the voyage stipulated in the shipping articles. That the evidence of deviation was material to the issue that the seamen were entitled to war bonus while interned on land west of the 180th meridian seems clear.

5. THE COURT ERRED IN DENYING THE MOTION OF LIBELANTS TO SET ASIDE THE SUBMISSION AND REOPEN CAUSE FOR THE INTRODUCTION OF FURTHER PROOF.

This subdivision was sufficiently developed in the opening brief at pages 15 to 18. Appellees have not questioned the authority of the cases there cited or attempted to distinguish them. Error in the ruling of the court was there fully demonstrated.

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6. THE DISTRICT COURT ERRED IN DENYING LIBELANTS ANY RECOVERY FOR MAINTENANCE.

At pages 35 and 36 of its brief, the appellee United States of America states:

> "* * * since appellants concede that the claims for maintenance are of the same nature as those pressed in *The President Harrison* and since nothing new is presented by them showing why that decision is improper, appellee rests upon the authority of this Court's decision in that case as full support of the District Court's conclusion that appellants in the present case have no right to maintenance during internment."

Appellee's statement of appellants' position is inaccurate. A new element has been added for the consideration of the court on this appeal with respect to maintenance. Under the doctrine of deviation of voyage appellants would be entitled to maintenance during the period of their internment on land and in fact from the date of their capture by the Japanese. The cases cited at page 19 of appellants' opening brief

remove any doubt on the subject. Appellants invoked and again invoke that rule.

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7. LIBELANTS ARE ENTITLED TO INTEREST AND COSTS.

Appellees have not challenged the soundness of this assignment if the decree be reversed. Appellants again assert it.

CONCLUSION.

Appellants again respectfully submit that the decree of the District Court should be reversed with direction to enter judgment for libelants together with interest and costs.

Dated, San Francisco,
January 16, 1950.

ALBERT MICHELSON,
Proctor for Appellants.